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AUG 21 2023

**OFFICE OF
WATER**

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August 18, 2023

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Re: *In the Matter of Water Permit Application No. 8744-3, Dakota Bay, LLC.*

To whom it may concern:

Enclosed please find a copy of the proposed Findings of Fact, Conclusions of Law and Final Decision and Certificate of Service in the above-referenced file.

Sincerely,

A handwritten signature in blue ink, reading "Ann F. Mines Bailey".

Ann F. Mines Bailey
Assistant Attorney General

AFM/mb

Enclosures

cc w/encs: Ron Duvall, DANR Water Rights Program

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AUG 21 2023

STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

OFFICE OF
WATER

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)	FINDINGS OF FACT,
APPLICATION NO. 8744-3, DAKOTA)	CONCLUSIONS OF LAW
BAY, LLC,)	AND FINAL DECISION

This matter came before the South Dakota Water Management Board for hearing on August 2, 2023. Board members Peggy Dixon, Rodney Freeman, Tim Bjork, Leo Holzbauer, and Bill Larson attended the hearing and heard the evidence presented. Applicant, Dakota Bay was represented by Dean A. Fankhauser and Stacy R. Hegge. Petitioner, McCook Lake Recreation Area Association (Association), was represented by John M. Hines. Ann F. Mines Bailey represented the Department of Agriculture and Natural Resources, Water Rights Program (Program) and the Chief Engineer.

The Board, having considered the testimony and exhibits presented and all records and documents on file and having entered its oral decision and rulings on the parties' submissions, now enters the following:

FINDINGS OF FACT

1. On March 29, 2023, the Program received Water Permit Application No. 8744-3 from Michael Chicoine on behalf of Dakota Bay seeking an appropriation of 28.6 acre-feet of water for the first year and 7.99 acre-feet of water per year thereafter at a maximum diversion rate of 1.55 cubic feet of water per second (cfs) from one existing well completed into the

Missouri: Elk Point aquifer for recreational use for an initial fill of a canal to be constructed along southeast shore of McCook Lake and thereafter to cover losses due to evaporation and seepage. The well is located in the E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 16 T89N-R48W and is permitted for irrigation use under Water Permit No. 6557-3.

2. The Chief Engineer, Eric Gronlund, recommended approval of the application subject to qualifications.

3. Notice of Water Permit Application No. 8744-3 was timely advertised on June 1, 2023, in The Leader-Courier (Union County) and the Yankton Daily Press and Dakotan (Yankton County) and posted on the DANR website.

4. Water Rights received a timely petition in opposition to Water Permit Application No. 8744-3 from the Association on June 12, 2023.

5. The matter was scheduled to be heard by the Water Management Board during its July 12, 2023 meeting. A request for an automatic delay was made and the July 12 hearing was delayed.

6. The Chief Engineer moved for a special meeting so that this matter could be heard in conjunction with the Association's petition for declaratory ruling which requested in part that the Board rule that Dakota Bay's project required a permit appropriating the waters of McCook Lake.

7. Water Permit Application No. 8744-3 is a new water permit application which requires a determination pursuant to SDCL § 46-2A-9 whether there is a reasonable probability that unappropriated water is

available for the proposed use, whether the proposed use would impair existing domestic water uses and water rights, whether the use would be a beneficial use, and whether the proposed use is in the public interest pertaining to matters of public interest within the regulatory authority of the Water Management Board.

8. The Association holds a permit/right for the appropriation of water from the Missouri River to be pumped into McCook Lake for the purpose of recreation to stabilize lake levels.

9. Nakaila Steen, a natural resources engineer with Water Rights, performed a technical review of the application and prepared a report. Ms. Steen provided expert testimony regarding the technical review of the application to the Board.

10. The Missouri: Elk Point aquifer is composed of glacial outwash consisting of fine sand to very coarse gravel. Within the State of South Dakota, the aquifer underlies approximately 219,100 acres in Clay, Union, and Yankton Counties. At the time of completion, aquifer material at the proposed point of diversion was approximately 95 feet thick. The aquifer varies from unconfined to confined conditions but generally behaves as an unconfined aquifer. At the point of diversion, the aquifer is under confined conditions with the existing well completion report demonstrating an artesian head pressure of approximately 40 feet at the time the well was constructed.

11. The Missouri: Elk Point aquifer receives recharge through infiltration of precipitation and from seepage from the Big Sioux, James,

Missouri, and Vermillion rivers and inflow from the Lower Vermillion-Missouri, Lower James-Missouri, Big Sioux, and Dakota aquifers. The best information available regarding recharge to the Missouri: Elk Point aquifer includes two studies – one based upon the observation well data and the other involving induced recharge to the aquifer due to pumping by the Lewis and Clark Regional Water System. The combined total of the estimated average annual recharge equals approximately 114,593.9 acre-feet of water per year.

12. Ms. Steen calculated withdrawals from the Missouri: Elk Point aquifer in South Dakota to be approximately 100,591 acre-feet per year, including water reserved by future use permits and requested by this application.

13. Ms. Steen further testified that there are 36 observation wells completed into the Missouri: Elk Point aquifer. A review of the data from those observation wells indicates that the aquifer is responding to climatic conditions and that natural discharge is available for capture. Several of the observation wells located near the Missouri River indicate a gradual downward trend. Ms. Steen testified that the downward trend is a result of the lowering of the water table due to the entrenchment (deepening of the channel and/or widening of the bed) of the Missouri River and not evidence of over-appropriation of the aquifer.

14. Ms. Steen testified it is her conclusion that, based upon her review of the best information available regarding recharge to the aquifer,

existing water rights, and the observation well data, there is sufficient unappropriated water available to satisfy this application.

15. There were 647 existing water rights/permits authorized to withdraw water from the Missouri: Elk Point aquifer in South Dakota at the time this application was submitted.

16. Ms. Steen testified that the nearest existing domestic well on record is located approximately 0.25 miles south of the proposed point of diversion and owned by Mr. Chicoine. The next nearest domestic well not owned by the applicant is located approximately 0.3 miles northwest of the proposed point of diversion.

17. The nearest existing water rights are three separate water rights/permits each located approximately one mile from the proposed point of diversion – one to the west and two to the southeast.

18. The nearest observation well is located approximately 0.6 miles from the proposed point of diversion.

19. Ms. Steen testified that the Missouri: Elk Point aquifer is a tremendous resource and given the saturated thickness of the aquifer in the area of the proposed point of diversion and relatively small volume requested by this application, there is a reasonable probability that the application could be developed without unlawful impairment to existing domestic uses and water rights. Bolstering her conclusion is that this point of diversion has been operating with the same rate of diversion under the irrigation permit since 2005 and there is no history of complaints.

20. Ms. Steen further testified that in her expert opinion an unlawful impairment will first occur in the source from which the appropriation is made.

21. The Board finds Ms. Steen to be a credible expert witness and that these Findings of Fact are supported by the evidence presented including Ms. Steen's testimony and the reports and exhibits which she prepared and/or upon which she relied.

22. The Board received testimony from Michael Chicoine who sought the application on behalf of Dakota Bay. Mr. Chicoine testified that he has applied for a shoreline alteration permit from the South Dakota Department of Game, Fish and Parks. He plans to construct a canal stemming off of McCook Lake to provide lake access for current residents, potential future residents, and the public. Mr. Chicoine provided testimony regarding the construction of the canal which includes an 18-inch fat, clay liner.

23. Kip Rounds, regional supervisor with the South Dakota Department of Game, Fish and Parks, also provided testimony to the Board. Mr. Rounds testified that he is familiar with Mr. Chicoine's shoreline alteration application and the proposed canal project. Mr. Rounds testified that the Department of Game, Fish and Parks has concerns that if the canal liner were to dry out, the integrity of the liner and ability to reduce seepage would be compromised.

24. The Board also received testimony from Dirk Lohry. Mr. Lohry testified that the Association will bear the burden of filling the canal should

Mr. Chicoine's well fail or water is not pumped under this proposed appropriation.

25. Petitioner did not submit sufficient evidence through expert opinions, testimony, or other evidence that would support a determination that there is a not reasonable probability that there is unappropriated water available, that there would be an unlawful impairment should the application be granted, that this appropriation is not a beneficial use of water, or that it is not in the public interest.

26. The Board finds that, based upon the best information reasonably available, the factors of SDCL § 46-2A-9 are satisfied.

27. The evidence establishes that there is unappropriated water available in the Missouri: Elk Point aquifer to satisfy this application.

28. The evidence establishes the proposed diversion would not unlawfully impair existing domestic water uses or water rights.

29. The Board further finds that the proposed use of the water for recreation, to fill the proposed canal and replace losses of water due to evaporation or seepage, constitutes a beneficial use.

30. The Board further finds that placing the water to this beneficial use is in the public interest.

31. Any finding of fact more properly designated as a conclusion of law shall be treated as such.

Based on the foregoing Findings of Fact, the Board makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. The application falls within the Board's responsibility over water appropriation and regulation in Title 46.
2. Publication was properly made, and the Notices of Hearing were properly issued pursuant to SDCL § 46-2A-4.
3. The Chief Engineer recommended granting the application. The recommendation, however, is not binding on the Board. SDCL § 46-2A-4(8).
4. The applicant is required to satisfy each of the factors set forth in SDCL § 46-2A-9.
5. The Board concludes that the applicant has satisfied each of the factors set forth in SDCL § 46-2A-9.
6. South Dakota Codified Law, section 46-2A-9 provides that a permit to appropriate water may be issued “only if there is reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment of existing domestic uses and water rights and that the proposed use is a beneficial use and in the public interest as it pertains to matters of public interest within the regulatory authority of the Water Management Board as defined by §§ 46-2-9 and 46-2-11.” Each of these factors must be met and the permit must be denied if the applicant does not meet its burden of proof on any one of them.

7. The first factor for consideration under SDCL § 46-2A-9 is whether there is water available for the appropriation. Determination of water availability includes consideration of the criteria in SDCL § 46-6-3.1 pertaining to recharge/withdrawal: whether “according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source.”

8. South Dakota Codified Law, section 46-6-3.1 provides an exception to the recharge/withdrawal limitation. It states in pertinent part, “[a]n application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the estimated average annual recharge for use by water distribution systems.” The Missouri: Elk Point aquifer is not older and stratigraphically lower than the Greenhorn Formation. Additionally, the permit is not for use in a water distribution system. Thus, the appropriation may not be granted if the withdrawal would exceed the estimated annual recharge.

9. The Board concludes it is not probable withdrawals from the aquifer would exceed recharge to the aquifer in violation of SDCL § 46-6-3.1 if the application is granted.

10. The Board concludes there is a reasonable probability that there is unappropriated water available to fulfill the amount requested by the application.

11. The second requirement of SDCL § 46-2A-9 is that the proposed water use may not unlawfully impair existing domestic uses and water rights. The proposed diversion can be developed without unlawful impairment of existing water rights or domestic water uses.

12. The third element set forth in SDCL § 46-2A-9 is whether the use of water would be a beneficial use: one that is reasonable and useful and beneficial to the appropriator and also consistent with the interest of the public in the best utilization of water supplies under SDCL § 46-1-6(3). The proposed use for recreation is a beneficial use.

13. The fourth requirement of SDCL § 46-2A-9 concerns the public interest. The proposed use of the water must be “consistent with the interests of the public of this state in the best utilization of water supplies.” SDCL § 6-1-6(3). The Board concludes that this appropriation of water for recreation is in the public interest.

14. Any conclusion of law more properly designated as a finding of fact shall be treated as such.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters its determination that Water Permit Application No. 8744-3 is granted with the following qualifications:

1. The well approved under Water Permit No. 8744-3 is located near domestic wells and other wells which may obtain water from the same aquifer. Water withdrawals shall be controlled so there is not a reduction of needed

water supplies in adequate domestic wells or in adequate wells having prior water rights.

2. The Permit holder shall report to the Chief Engineer annually the amount of water withdrawn from the Missouri Elk Point aquifer.

3. Water Permit No. 8744-3 authorizes a total diversion of up to 28.6 acre-feet of water the first year when use begins and then up to 7.99 acre-feet annually from the Missouri: Elk Point aquifer.

Dated this ____ day of October, 2023.

BY THE BOARD:

South Dakota Water Management Board

AUG 21 2023

STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

OFFICE OF
WATER

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT
APPLICATION NO. 8744-3, DAKOTA
BAY, LLC,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copy of the proposed Findings of Fact, Conclusions of Law and Final Decision, in the above matter, was served by U.S. mail, first-class, postage prepaid, upon the following on this 18th day of August 2023:

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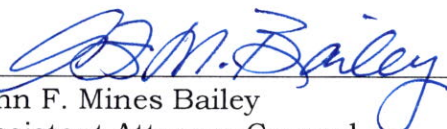
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